

NOTICE OF FILING

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EQUITY TRUSTEES SUPERANNUATION LIMITED (ACN 055 641 757)
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



Statement of Claim

No of 2025

Federal Court of Australia
District Registry: Victoria
Division: General

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

EQUITY TRUSTEES SUPERANNUATION LIMITED (ACN 055 641 757)

Defendant

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A. PARTIES

1. The plaintiff (**ASIC**):
 - (a) was established by s 7 of the *Australian Securities Commission Act 1989* (Cth) and is continued in existence by s 261 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**); and
 - (b) is a body corporate under s 8(1)(a) of the ASIC Act and can sue in its corporate name by operation of s 8(1)(d) of the ASIC Act.
2. The defendant (**ETSL**), between March 2023 and March 2024 (**Relevant Period**) is and was:
 - (a) a body corporate incorporated under the *Corporations Act 2001* (Cth) (**Corporations Act**), carrying on the business of acting as a trustee of superannuation entities and investing money on behalf of the beneficiaries of those superannuation entities;
 - (b) a financial services licensee (previously within the meaning of s 761A of the Corporations Act and now within the meaning of s 9 of the Corporations Act);
 - (c) the holder of an Australian Financial Services Licence (**AFSL**) (licence no. 229575), which authorises it to carry on a financial services business for retail and wholesale clients to, among other things:
 - (i) deal in a financial product, being superannuation; and
 - (ii) provide a superannuation trustee service;
 - (d) the holder of a registrable superannuation entity (**RSE**) licence (licence no: L0001458), within the meaning of s 10(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**); and
 - (e) the trustee of the AMG Superannuation Fund (**AMG Super**).

B. ETSL AS TRUSTEE OF AMG SUPER

B1. ETSL

3. During the Relevant Period, ETSL:

(a) operated a business in which it acted as trustee of AMG Super in which were held total assets of at least:

(i) \$2.1 billion as at 30 June 2023; and

(ii) \$2.6 billion as at 30 June 2024; and

(b) was the trustee of member directed superannuation funds (**Platforms**).

B2. AMG Superannuation Fund

4. ETSL is, and has been since 23 February 2017, the trustee of AMG Super, which was established by a trust deed dated 12 May 2000 (as amended from time to time) (**AMG Super Trust Deed**).

Particulars

A. AMG Universal Super Deed Poll by Permanent Trustee

B. Company Limited dated 12 May 2000.

C. The amending deeds to the AMG Super Trust Deed include:

a. Deed of Amendment - AMG Universal Super by The Trust Company (Superannuation) Limited dated 27 November 2013, pursuant to which all of the existing clauses, schedules and headings in the Trust Deed were deleted and replaced;

b. Amending Deed Poll AMG Universal Super by The Trust Company (Superannuation) Limited dated 7 May 2014, pursuant to which the AMG Super Trust Deed was amended to change the name of the Fund (as defined in the AMG Super Trust Deed) to 'AMG Super';

c. Deed of Retirement and Appointment between Diversa Trustees Limited (formerly The Trust Company (Superannuation) Limited), ETSL and Acclaim Management Group Pty Ltd dated 23 February 2017, pursuant to which ETSL was appointed trustee to

replace Diversa Trustees Limited and ETSL agreed to perform all of the obligations of the trustee under the AMG Super Trust Deed (as amended from time to time);

- d. Trust Deed of Amendment by ETSL (undated), pursuant to which a new clause 9.12 was inserted; and
- e. Deed of Amendment by ETSL effective from 1 December 2021, pursuant to which the AMG Super Trust Deed was amended to establish a new division to be known as NQ Super & Pension.

- 5. AMG Super was at all times during the Relevant Period:
 - (a) a registrable superannuation entity within the meaning of s 10(1) of the SIS Act;
 - (b) a regulated superannuation fund within the meaning of s 19(1) of the SIS Act; and
 - (c) a superannuation entity within the meaning of s 10(1) of the SIS Act.
- 6. At all times during the Relevant Period, the AMG Super Trust Deed provided:
 - (a) in cl 2.3, that ETSL would hold on the trusts set out in the deed any contributions paid to and accepted by it for the purposes of AMG Super and any property acquired by it on the investment of contributions made to AMG Super;
 - (b) in cl 9.2(a), that ETSL covenanted to act honestly in all matters concerning AMG Super;
 - (c) in cl 9.2(b), that ETSL covenanted to exercise in relation to all matters affecting AMG Super the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide;
 - (d) in cl 9.2(c), that ETSL covenanted to ensure that ETSL's duties and powers were performed and exercised in the best interests of members;

- (e) in cl 9.3, that ETSL:
 - (i) had an absolute and uncontrolled discretion in the exercise of its powers, authorities and discretions;
 - (ii) could exercise or refrain from exercising all or any of those powers, authorities and discretions at any time; and
 - (iii) was not bound to give to any person any reason for or explanation of its exercise, non-exercise or partial exercise of any such power;
- (f) in cl 9.12, that AMG Super:
 - (i) consisted of any categories, classes, divisions, sub-divisions or sub-plans as determined by ETSL; and
 - (ii) was one trust comprising different parts;
- (g) in cl 10.1, that ETSL could do anything it considered necessary to administer AMG Super and to comply with the SIS Act;
- (h) in cl 10.7, that any exercise by ETSL of any power, discretion or authority of ETSL could be made by a resolution of the corporation or by a resolution of its board of directors or other governing body; and
- (i) in cl 11.1, that ETSL would set investment objectives for AMG Super and formulate an investment strategy to achieve those objectives having regard to the whole of the circumstances of AMG Super including, but not limited to, the matters prescribed under the SIS Act.

Particulars

A. Deed of Amendment - AMG Universal Super by The Trust Company (Superannuation) Limited dated 27 November 2013.

B. Trust Deed of Amendment by ETSL (undated).

B3. NQ Super & Pension division of AMG Super

- 7. Effective from 1 December 2021, NQ Super & Pension (**NQ Super**) was established as a division of AMG Super.

Particulars

Deed of Amendment to the AMG Super Trust Deed by ETSL, effective 1 December 2021, Attachment 1, Schedule D.

8. On or about 26 August 2022, ETSL issued a Product Disclosure Statement (**PDS**) with respect to NQ Super (**NQ Super PDS**) and an Additional Information Booklet that formed part of the NQ Super PDS.

Particulars

NQ Super PDS and Additional Information Booklet prepared 26 August 2022.

9. The NQ Super PDS provided in section 1:
 - (a) if a member established an NQ Super account, any contributions or amounts paid into NQ Super would be invested in accordance with a member's selected investment strategy and underlying investments determined in conjunction with the member's financial advisor; and
 - (b) ETSL was responsible for managing AMG Super and its service providers to ensure that it complied with all legal requirements and operated in the best financial interests of members.

Particulars

NQ Super PDS prepared 26 August 2022, p2.

10. The Additional Information Booklet provided:
 - (a) with respect to investment holding limits, that:
 - (i) ETSL, as trustee, imposed certain limits on the amount that could be invested in certain investments;
 - (ii) the limits related to single investments and the aggregate holding in a type of investment of the account;
 - (iii) these limits helped to keep a member's investment portfolio diversified; and

- (iv) with respect to managed funds, the single holding limit was up to 50% of a member's account value and the aggregate holding limit was up to 100% of a member's account value, meaning that the holding limit was up to 50% of a member's account value in a particular managed fund and up to 100% of a member's account value in managed funds;
- (b) with respect to illiquid investments that:
 - (i) ETSL generally considered an investment to be illiquid if it could not be converted to cash in less than 30 days;
 - (ii) an investment might also be illiquid if conversion to cash within 30 days would have a significant adverse impact on the value of the investment; and
 - (iii) it could take 30 days or longer from the time ETSL received all relevant information to finalise a withdrawal request involving illiquid or suspended investments; and
- (c) ETSL, as trustee, managed the impact of risks associated with investments by having risk management and compliance arrangements in place in accordance with legislative requirements and by having a risk management strategy to help manage risks.

Particulars

NQ Super Additional Information Booklet prepared 26 August 2022, p18, p21 and, p28.

11. In respect of NQ Super, ETSL:
- (a) made investments available to members of NQ Super for their selection (each such selectable investment being an **Investment Option**); and
 - (b) maintained a list of Investment Options approved by it and from which members could select investments and give investment directions (**Investment Menu**).

B4. ETSL, s 52 SIS Act covenants and prudential standards

12. By operation of s 52(1) of the SIS Act, during the Relevant Period, the 'governing rules' of AMG Super included covenants to the effect that ETSL, as trustee:
- (a) exercise, in relation to all matters affecting AMG Super, the same degree of care, skill and diligence as a prudent superannuation trustee would exercise in relation to an entity of which it is trustee and on behalf of the beneficiaries of which it makes investments (s 52(2)(b) of the SIS Act);
 - (b) perform the trustee's duties and exercise the trustee's powers in the best financial interests of the beneficiaries of AMG Super (s 52(2)(c) of the SIS Act);
 - (c) formulate, review regularly and give effect to an investment strategy for:
 - (i) the whole of AMG Super; and
 - (ii) each investment option offered by it in AMG Super, having regard to matters listed in s 52(6)(a)(i) to (viii) of the SIS Act (s 52(6)(a) of the SIS Act);
 - (d) exercise due diligence in developing, offering and reviewing regularly each investment option offered by it in AMG Super (s 52(6)(b) of the SIS Act); and
 - (e) promote the financial interests of the beneficiaries of AMG Super who hold a choice product, in particular, returns to those beneficiaries (after the deduction of fees, costs and taxes) (s 52(12) of the SIS Act).

Particulars

The covenants are taken to be so included by operation of s 52(1) of the SIS Act.

'Governing rules' has the meaning given to that term at s 10 of the SIS Act.

13. During the Relevant Period, by operation of s 29E(1)(a) of the SIS Act, it was a condition of ETSL's RSE licence that it comply with the RSE Licence Law as defined in s 10 of the SIS Act, which included prudential standards made by the

Australian Prudential Regulation Authority (**APRA**) under s 34C of the SIS Act, including:

- (a) as to investment governance: *Superannuation (Prudential Standard) Determination No. 2 of 2022 – Prudential Standard SPS 530 - Investment Governance (SPS 530)*; and
- (b) as to risk management: *Superannuation (Prudential Standard) Determination No. 3 of 2019 Prudential Standard SPS 220 – Risk Management (SPS 220)*.

B5. ETSL's Investment Governance Framework

- 14. Throughout the Relevant Period, ETSL adopted and maintained an investment governance framework (**IGF**).
- 15. The IGF relevantly comprised:
 - (a) the Investment Governance Framework Policy (**IGFP**), as amended from time to time;
 - (b) the Investment Governance Protocol – Platform Options (**IGPPO**), as amended from time to time; and
 - (c) the AMG Super Investment Strategy (**AMG Super Investment Strategy**) (which applied to NQ Super), as amended from time to time.

Particulars

- A. IGFP dated October 2022; October 2023.
- B. IGPPO dated October 2022; October 2023.
- C. AMG Super Investment Strategy dated December 2022; AMG Super Investment Policy Statement dated December 2023.

The Investment Framework Policy (IGFP)

- 16. At all times during the Relevant Period (unless otherwise indicated below), the IGFP provided that:
 - (a) the ETSL Board was at all times responsible for each fund's investments;

- (b) the ETSL Board delegated some decision-making responsibilities to various committees and management groups;
- (c) the responsibility for approval of Level 1 investments (as alleged in paragraph 20(a) below) was delegated to the Superannuation Investment Office (**SIO**); and
- (d) the responsibility for approval of Level 2 investments (as alleged in paragraph 20(b) below) was delegated to the Board Investment Committee (**BIC**).

Particulars

IGFP dated October 2022, section 4, pp4-5; IGFP dated October 2023, section 4, pp 4-5.

17. At all times during the Relevant Period, the IGFP provided that, with respect to Platforms:
- (a) members of the Platforms exercised investment choice by directing ETSL in relation to investment strategies and options;
 - (b) ETSL retained the right to determine the investment offering; and
 - (c) investment options might be subject to limits and restrictions as seen fit by ETSL.

Particulars

IGFP dated October 2022, section 7, p 7; October 2023, section 7, p 7.

The Investment Governance Protocol – Platform Options (IGPPO)

18. At all times during the Relevant Period, the IGPPO provided, with respect to investment strategy, that the investment strategy determined by ETSL with respect to managed funds was to:
- (a) select and approve an appropriate range of managed funds within each asset class based on the investment manager's capabilities, investment style and performance;

- (b) ensure that managed funds offered to members maintained an appropriate investment grade standard; and
- (c) monitor investment return performance.

Particulars

IGPPO dated October 2022, section 2; IGPPO dated October 2023, section 2.

19. At all times during the Relevant Period (save as alleged below), the IGPPO provided, with respect to investment selection, that:
- (a) ETSL's investment selection process (**Investment Selection Process**) was that:
 - (i) first, an investment manager would make a recommendation to the SIO;
 - (ii) second, the SIO would conduct a review of the recommendation;
 - (iii) third, if the SIO approved the recommendation:
 - (A) for a Level 1 investment (as alleged in paragraph 20 below), a member of the BIC or the Executive General Manager – Superannuation Trustee Office (**EGM-STO**) would review the recommendation; and
 - (B) for a Level 2 investment (as alleged in paragraph 20 below), the BIC would review the recommendation and give any approval; and
 - (iv) fourth, the SIO would implement the approval of the investment selection;
 - (b) the aim of the Investment Selection Process was to ensure that due diligence was conducted commensurate with the nature and characteristics of the investment;

- (c) the process sought to establish that the ETSL Board and delegated committees were satisfied:
 - (i) that they had sufficient understanding and knowledge of the investment selected, including an assessment of any factors that could have a material impact on achieving the investment objectives of the investment option;
 - (ii) (in the period until October 2023) they had sufficient understanding of how the investment was expected to perform under the range of stress scenarios;
- (d) (in the period until October 2023) the ETSL Board or (in the period after October 2023) the BIC could implement limits on investments with due consideration to such factors as liquidity, diversification and level of investment risk;
- (e) ETSL sought to provide a range of investments that:
 - (i) allowed members (preferably with financial advice) to direct their own investment choices with consideration to their individual personal circumstances and preferences;
 - (ii) had satisfied the investment selection process;
 - (iii) were true to label; and
 - (iv) were within the parameters of each fund's investment strategy.

Particulars

IGPPO dated October 2022, section 3; IGPPO dated October 2023, section 3.

20. At all times during the Relevant Period, for the purpose of the Investment Selection Process, the IGPPO provided that investments were categorised as Level 1 and Level 2 as follows:
- (a) Level 1 investments included registered managed investment schemes recommended by an investment consultant (in the period up until October 2023) or by an asset consultant or investment manager (in the period after

October 2023), or were investment grade rated (where relevant) with a redemption profile of no more than monthly redemption; and

- (b) Level 2 investments included:
 - (i) an investment with greater than 25% exposure to illiquid assets; and
 - (ii) other investments as considered appropriate by the SIO due to their complexity or non-standard nature.

Particulars

IGPPO dated October 2022, section 4; IGPPO dated October 2023, section 4.

- 21. At all times during the Relevant Period, the IGPPO provided with respect to investment approvals:
 - (a) the ETSL Board had delegated responsibility for investment approvals (except for investment strategies) to the BIC;
 - (b) the BIC had delegated approval authority for Level 1 investments to the SIO, subject to review from a member of the BIC or a member of the EGM-STO, and such investments would be noted at a BIC meeting; and
 - (c) Level 2 investments could only be made with the BIC's approval.

Particulars

IGPPO dated October 2022, section 4; IGPPO dated October 2023, section 4.

The AMG Super Investment Strategy (in relation to NQ Super)

- 22. The AMG Super Investment Strategy:
 - (a) described the investment strategy of the AMG Super Fund and sub-plans; and
 - (b) determined appropriate measures to monitor the performance of investments; and
 - (c) provided the basis for the review of investment objectives and investment strategies.

Particulars

AMG Super Investment Strategy dated December 2022, section 1; AMG Super Investment Policy Statement dated December 2023, section 1.1.

23. Further, the AMG Super Investment Strategy provided that:
- (a) the aim of the investment selection process was for ETSL to ensure that effective due diligence was completed that was commensurate with the nature and characteristics of the investment and in doing so, the goal of the process was to result in ETSL being satisfied that:
 - (i) it had sufficient understanding and knowledge of the investment selected, including an assessment of any factors that could have a material impact on achieving the investment objectives of the investment option;
 - (ii) it had sufficient understanding of how the investment was expected to perform under a range of stress scenarios; and
 - (iii) the investment was appropriate for the investment option;

Particulars

AMG Super Investment Strategy dated December 2022, section 4.1.

- (b) the goal of the process for selection of platform investment options was subject to ETSL being satisfied that the investment was consistent with the investment objectives and strategies as allowed under the Investment Strategy;

Particulars

AMG Super Investment Strategy dated December 2022, section 4.2.

- (c) ETSL could impose upper limits on investment in certain investments available through the fund with consideration to liquidity, diversity and risk, and the limits would be articulated in relation to both single security and aggregate holdings, at member account level; and

Particulars

AMG Super Investment Strategy dated December 2022, section 4.3.

- (d) with respect to NQ Super, that:
 - (i) no more than 10% of a member's portfolio could be allocated to illiquid holdings, being where the "product may not be able to be converted to cash within 360 days"; and
 - (ii) where ETSL offered members an externally managed investment option, ETSL would adopt the investment objectives specific to that option and these objectives could be found in the offer documents made available to members prior to investment.

Particulars

AMG Super Investment Strategy dated December 2022, Appendix 4; AMG Super Investment Policy Statement dated December 2023, Appendix 4.

C. INVESTMENT OPTIONS: FIRST GUARDIAN MASTER FUND CLASSES

- 24. The First Guardian Master Fund (**FGMF**) was a registered managed investment scheme (ARSN: 635 429 113) registered on 23 August 2019.
- 25. At all material times:
 - (a) Falcon Capital Limited (**Falcon**) was the responsible entity of the FGMF and the holder of an AFSL (302 538); and
 - (b) First Guardian Capital Pty Ltd (**First Guardian**) was the investment manager of the FGMF.
- 26. During the Relevant Period, Falcon offered investors three classes of units in the FGMF (collectively, the **FGMF Classes**):
 - (a) the First Guardian Defensive Strategies Class (**Defensive Class**);
 - (b) the First Guardian Diversified Strategies Class (until 15 January 2024) (**Diversified Class**); and
 - (c) the First Guardian Growth Strategies Class (**Growth Class**).

27. In November 2022, Falcon issued PDSs for each of the FGMF Classes which stated that:

- (a) each FGMF Class was a long-term investment with a recommended investment period of 3 to 5 years;
- (b) funds were invested by the FGMF in a varying number of underlying funds (**FGMF Underlying Funds**);
- (c) the FGMF Underlying Funds were Australian, unregistered open-ended unit trusts of which Falcon was the trustee;
- (d) there were certain fees that were charged and collected at the level of the FGMF Underlying Funds, including management fees and performance fees;
- (e) FGMF provided a daily withdrawal facility and once accepted by Falcon, payments for withdrawals were processed within 5 days;
- (f) withdrawals could be suspended in certain circumstances or generally if Falcon believed it to be in the best interests of investors to do so, and Falcon was not obliged to satisfy an application for redemption of units in the FGMF;
- (g) a diversified investment was an investment product that consisted of multiple specialised funds from various investment managers;
- (h) changes could be made to the investment objectives and strategy of the FGMF Underlying Funds; and
- (i) under the heading "Risks":
 - (i) investments in real estate are illiquid and as such, a significant component of the total assets of the FGMF would be illiquid, and this illiquidity meant that Falcon would not be able to sell the FGMF assets at a time it chose or might not be able to realise the full value of the assets on a sale;
 - (ii) Falcon could also be required to realise assets in order to fund development activity, and the illiquidity of those assets might mean

that the manager was unable to realise the full value of the assets on a sale; and

- (iii) while Falcon might have such rights, an investor could not withdraw from the FGMF and was not entitled to require their units to be purchased, repurchased, or redeemed, either in whole or party other than as provided in the FGMF's constitution and as such, an investment in the FGMF was illiquid and investors might not be able to exit at a time of their choosing.

Particulars

- A. Defensive Class PDS dated 15 November 2022.
- B. Diversified Class PDS dated 15 November 2022.
- C. Growth Class PDS dated 15 November 2022.

28. During the Relevant Period, Falcon issued Target Market Determinations (**TMDs**) for each of the FGMF Classes which stated that:

- (a) the target market included an investor who had an investment timeframe of 3 to 5 years and did not require frequent access to capital;
- (b) each FGMF Class was a medium-term investment, with a recommended investment period of 3 to 5 years, which was due in part to the illiquid nature of some components of the underlying assets that the Class intended to invest in, including real property development projects amongst others; and
- (c) each FGMF Class provided a daily withdrawal facility to holders of units and once accepted by the trustee, withdrawals were processed in 5 days; and
- (d) given each FGMF Class might be exposed to Australian property that was illiquid and not actively traded, the product might not be suitable for clients who needed to withdraw money frequently (including daily or weekly).

Particulars

- A. TMD for the Diversified Class.
- B. TMD for the Growth Class.

C. TMD for the Defensive Class.

D. APPROVAL OF FGMF CLASSES AS INVESTMENT OPTIONS

D1. Information and consideration

29. On 23 March 2023, ETSL received a request for approval to add the Defensive, Diversified and Growth Classes of the FGMF to NQ Super's Investment Menu, which also included:
- (a) a spreadsheet completed by or on behalf of Falcon or First Guardian, identifying certain features (including those pleaded in paragraph 30 below) of the FGMF Classes (**FGMF Investment Approvals Spreadsheet**);
 - (b) copies of the PDS for each of the FGMF Classes;
 - (c) copies of the TMD for each of the FGMF Classes;
 - (d) copies of a Monthly Performance Report dated December 2022 for each of the FGMF Classes; and
 - (e) a report on the FGMF (comprising each of the FGMF Classes) prepared by SQM Research dated 30 January 2023 (**SQM Report**).

Particulars

The request and information were received by way of an email from Willian Suryadharma (New Quantum Pty Ltd) to Peter Tomich (ETSL), Ben Ashton (ETSL) and Tanisha Maugi (First Guardian) dated 23 March 2023, attaching the documents described in paragraph 29(a) to 29(e) above, namely:

- A. FGMF Investment Approvals Spreadsheet;
- B. two copies of the TMD for the Diversified Class;
- C. TMD for the Growth Class;
- D. TMD for the Defensive Class;
- E. PDS for the Diversified Class;
- F. PDS for the Growth Class;
- G. Monthly Performance Report for the Defensive Class;

- H. Monthly Performance Report for the Diversified Class;
- I. Monthly Performance Report for the Growth Class;
- J. SQM Report; and
- K. PDS for the Defensive Class.

30. The FGMF Investment Approvals Spreadsheet contained information with respect to each of the FGMF Classes as follows:

- (a) the description and investment objective was described as a diversified portfolio of predominantly growth assets;
- (b) the performance fee was not applicable;
- (c) the percentage of the fund in liquid assets was:
 - (i) 39% for the Defensive Class;
 - (ii) 38% for the Diversified Class; and
 - (iii) 54% for the Growth Class;
- (d) both the size of the fund and the assets managed by the manager were:
 - (i) \$8.9 million for the Defensive Class;
 - (ii) \$100 million for the Diversified Class; and
 - (iii) \$238 million for the Growth Class;
- (e) the rating was 3.75 Stars given by SQM Research; and
- (f) the redemption timing was 3-5 years.

31. The SQM Report stated that:

- (a) it rated the FGMF as 3.75 stars (out of 5) or “Favourable”, and described that as “Approved”;
- (b) the rating applied to each of the FGMF Classes and not the four identified FGMF Underlying Funds;
- (c) for each FGMF Class the investment return objectives, and allowable ranges of allocations to FGMF Underlying Funds, and fees;

- (d) the FGMF Underlying Funds were Australian, unregistered open-ended unit trusts and Falcon was the trustee of these underlying funds;
- (e) advisors/investors should refer to the PDSs of the FGMF Underlying Funds for details;
- (f) the FGMF had a relatively limited history of 3.2 years;
- (g) performance fees were not applicable at the level of the FGMF but the performance fee applied to some of the FGMF Underlying Funds and management fees were charged on a look-through basis;
- (h) the investment team had relatively limited experience in managing multi-asset diversified funds compared to some of the much bigger multi-asset peers;
- (i) some of the underlying sub-funds (and their holdings) added to the complexity of the FGMF;
- (j) the FGMF's liquidity profile was different from a typical balanced fund and some of the underlying sub-funds were less liquid and had lock-in periods, and the Diversified Class offered daily withdrawals processed within 30 days;
- (k) the FGMF was overexposed to the residential property development and mortgage lending sector and did not have any exposure to the largest equity markets, which reduced its diversification and increased its concentration risk on a relative basis;
- (l) in addition to the PDS of each of the three FGMF Classes, advisers and investors should refer to the individual PDSs of the four underlying sub-funds for further details (including their risk-return profile);
- (m) the Board of Falcon was not constituted by a majority of independent directors;
- (n) relative to traditional/typical balanced funds the FGMF had a materially different asset allocation mix and was significantly overweight in unlisted/direct assets, fixed income and alternatives;

- (o) there was no leverage at the fund level however the underlying strategies (or sub-funds) would employ leverage; and
 - (p) return objectives were revised down in 2022, after being revised down in 2021.
32. Between about 23 March 2023 and 30 March 2023, ETSL considered the request for approval of the addition of the FGMF Classes to the NQ Super Investment Menu with:
- (a) a version of the FGMF Investment Approvals Spreadsheet which incorporated (among other things) the SIO's assessment of the FGMF (**SIO Assessment Approvals Spreadsheet**); and
 - (b) the material referred to in paragraph 29(b)-(e) above.

Particulars

ETSL considered the request through a review and approval by the SIO and a review conducted by the EGM-STO.

Email from Marcus Shaw (Senior Analyst, Investment Governance, SIO) to Andrew Godfrey (EGM-STO) dated 29 March 2023 with the subject line "New Quantum APL Level 1 Approvals", attaching the SIO Assessment Approvals Spreadsheet and stating that all proposed investment options were liquid multi-asset strategies and that the SIO recommended a 100% holding limit.

Second email from Marcus Shaw to Andrew Godfrey dated 29 March 2023 with the subject line "New Quantum APL Level 1 Approvals".

Email from Andrew Godfrey to Marcus Shaw dated 30 March 2023.

33. As at 30 March 2023, ETSL was aware, and further or alternatively, by reason of the matters alleged in paragraphs 29 to 32 above had received information indicating, that the FGMF had the following characteristics:
- (a) a performance history of about 3.2 years;
 - (b) a 3.75 star rating from SQM Research;

- (c) investments in, and Falcon or First Guardian proposed that additional funds would be invested in, a combination of four FGMF Underlying Funds:
 - (i) chosen by First Guardian as the investment manager;
 - (ii) of which Falcon was the trustee;
 - (iii) that were unregistered, and the financial accounts of which therefore were not required by law to be audited;
 - (iv) that might be illiquid and have lock-in periods; and
 - (v) in which particular investments and assets were not identified and might be located overseas;
- (d) a percentage of the fund invested in liquid assets (as expressed by Falcon) as:
 - (i) 39% for the Defensive Class;
 - (ii) 38% for the Diversified Class; and
 - (iii) 54% for the Growth Class;
- (e) payments for redemptions and withdrawals were to be processed within 5 days of acceptance by Falcon, but Falcon as responsible entity was not obliged to satisfy that request;
- (f) performance fees were not charged at the fund level, but the performance fee applied to some of the FGMF Underlying Funds;
- (g) the Board of Falcon was not constituted by a majority of independent directors;
- (h) overexposure to the residential property development and mortgage lending sectors which reduced its diversification;
- (i) relative to a traditional/typical balanced fund, a materially different asset allocation mix that was significantly overweight to unlisted/direct assets, fixed income and alternatives;
- (j) an investment team that had relatively limited experience in managing multi-asset diversified funds;

- (k) return objectives were revised down in 2022, after being revised down in 2021; and
- (l) other characteristics described in the PDSs and TMDs, as pleaded in paragraph 27 and 28 above.

Particulars

ETSL's awareness of these matters is to be inferred from:

- A. Material, referred to in paragraphs 29 to 32 above, received by SIO personnel with roles or authority to review, consider or approve investments.
 - B. Information contained in the FGMF Investment Approvals Spreadsheet prepared by or on behalf of Falcon or First Guardian and provided to ETSL by New Quantum.
 - C. Information contained in the SIO Investment Approvals Spreadsheet prepared on behalf of the SIO and provided by Marcus Shaw to Andrew Godfrey.
34. ETSL did not, before it approved each of the FGMF Classes for inclusion on the NQ Super Investment Menu:
- (a) obtain or review a copy of the FGMF managed investment scheme constitution;
 - (b) obtain or review a copy of any constitution or PDS for any FGMF Underlying Fund;
 - (c) review all or a sample of the assets held by the FGMF Underlying Funds for:
 - (i) ownership;
 - (ii) conformity with the description or type of assets in which that sub-fund would invest;
 - (iii) liquidity; or
 - (iv) valuation;
 - (d) undertake or assess stress testing of the FGMF or the FGMF Underlying Funds;

- (e) obtain or review a copy of audited accounts of the FGMF or an audit of its compliance plan;
- (f) obtain a copy of or verify the implementation by Falcon or First Guardian of policies or practices about:
 - (i) related party conflicts;
 - (ii) investment valuation;
 - (iii) redemptions and withdrawals from the FGMF; or
 - (iv) charging of performance fees;
- (g) obtain from First Guardian a completed Financial Services Council Operational Due Diligence Questionnaire in respect of the FGMF; or
- (h) investigate and consider the level of fraud-related investment risk in relation to the FGMF (including the FGMF Underlying Funds) as required by SPG 223 *Fraud Risk Management* (June 2015) at Chapter 4 Superannuation-specific fraud risks at p 13, and Attachment A at [3].

D2. Approval of Investment Options and non-compliance with ETSL processes

35. On 30 March 2023, in the circumstances alleged in paragraphs 29 to 34 above, ETSL approved each of the FGMF Classes for inclusion on the Investment Menu and determined to apply no holding limit (by providing for a holding limit of 100%).

Particulars

The SIO approved each FGMF Class for inclusion on the NQ Super Investment Menu on 29 March 2023, subject to review by the EGM-STO, which review occurred on 30 March 2023.

ASIC refers to and repeats the particulars to paragraph 32 above.

36. Further, ETSL's conduct in consideration and approval as alleged in paragraphs 29 to 35 above was not in compliance with or fulfillment of the provisions of the NQ Super PDS (as alleged in paragraphs 8 to 10 above) and the policies which ETSL had adopted and maintained (as alleged in paragraphs 14 to 23 above), in that:

- (a) by failing to take the steps alleged in paragraph 34 above before approving each of the FGMF Classes as alleged in paragraph D2 above, ETSL did not, for the purposes of investment selection in accordance with the Investment Selection Process under the IGPPO and with the AMG Super Investment Strategy as alleged in paragraphs 19(b)-(c) and 23(a)-(b) above, undertake effective due diligence commensurate with the nature and characteristics of the FGMF and prospective investment in it, for ETSL to be satisfied before approving the FGMF Classes that:
- (i) it had sufficient understanding and knowledge of the FGMF Classes;
 - (ii) it had sufficient understanding of how investment in the FGMF Classes was expected to perform under a range of stress scenarios; and
 - (iii) investment in the FGMF Classes was appropriate;
- (b) ETSL did not obtain approval of the BIC in circumstances where the information received by ETSL as alleged in paragraph 30(c) above represented that each FGMF Class had greater than 25% exposure to illiquid assets, by reason of which each was categorised as a Level 2 investment for the purposes of the Investment Selection Process and required approval by BIC, and not by the SIO with review by the EGM-STO (as alleged in paragraphs 19(a)(iii)(B) and 20 above); and
- (c) ETSL did not impose an investment holding limit of no more than 50% for each FGMF Class, in circumstances where each FGMF Class was a managed fund investment, in accordance with the Additional Information Booklet as alleged at paragraph 10(a)(iv) above.

Particulars

As to (b), ASIC refers to paragraphs 30(c) above and section 3 of the IGPPO (referred to in paragraphs 20 to 22 above).

As to (c), ASIC refers to paragraph 10 above.

D3. Offering the Investment Options and making investments

37. From around 30 March 2023, ETSL offered to members each of the Growth Class and the Defensive Class (**Relevant Classes**) as Investment Options on the NQ Super Investment Menu.
38. In the Relevant Period, after approval and offering the Relevant Classes as alleged in paragraph 35 above, ETSL:
 - (a) maintained the Relevant Classes on NQ Super's Investment Menu and continued to offer the Relevant Classes for selection by members for investment; and
 - (b) acted on the directions of members to make investments in the Relevant Classes.
39. Further, in the Relevant Period after approval and offering the Relevant Classes as alleged in paragraph 37 above:
 - (a) ETSL as trustee of AMG Super, upon directions of members of NQ Super, invested in the Relevant Classes amounts totalling around \$65,568,365.19; and
 - (b) Falcon issued units in the Relevant Classes to ETSL as trustee of AMG Super.

E. CONTRAVENTIONS: APPROVAL AND OFFERING RELEVANT CLASSES AS INVESTMENT OPTIONS

E1. Care, skill and diligence – section 52(2)(b) of the SIS Act

40. A prudent superannuation trustee in the position of ETSL as trustee of AMG Super, aware of the matters alleged in paragraph 33 above (that trustee, the **Prudent Superannuation Trustee**), on or by 30 March 2023 would have been aware of and had regard to risks relevant to a decision to offer or invest in the Relevant Classes:
 - (a) of illiquidity (at the time or in the future) of the FGMF and the FGMF Underlying Funds;
 - (b) that financial returns and timely payment of redemptions to members of NQ Super could be adversely affected by the illiquidity of the Relevant

- Classes as Investment Options, and that Falcon was entitled to refuse redemption or withdrawal requests;
- (c) that the FGMF was not, or may not be, invested in a diversified portfolio of ultimate investments;
 - (d) that information obtained directly or indirectly from Falcon and First Guardian, without verification or other inquiry by ETSL, was not reliable or complete for the purposes of gaining an accurate understanding or knowledge of the Relevant Classes and their appropriateness as Investment Options;
 - (e) of the FGMF being:
 - (i) operated by an investment team with relatively limited experience in managing what were stated to be multi-asset or diversified funds;
 - (ii) operated in breach of a policy for managing conflicts of interest, or without an adequate policy for managing conflicts of interest or other policies on governance and prudential matters; and
 - (iii) invested in assets which did not correspond with the description of investments in the respective PDS, or in information provided by Falcon or First Guardian;
 - (f) of material misrepresentation of asset risk and return profile, and fraud in the conduct of the FGMF, including misappropriation or misapplication of funds, or material overstatement of investment asset (and therefore FGMF Class unit) value.

Particulars

As to (a), ASIC refers to the FGMF Investment Approvals Spreadsheet, referred to in paragraph 30(c) above, and to statements as to liquidity or lack of liquidity within the FGMF PDS and SQM Report.

As to (b), ASIC refers to paragraphs 27(e), 27(f), 27(i)(iii) and 31(j) above.

As to (c) and (d), ASIC refers to the statements in the SQM Report to the effect that the FGMF was not a typical

balanced fund, and that it was overexposed or had significant exposure to certain types of investment, referred to in paragraphs 31(i) to 31(l) and 31(n) above, and statements in the FGMF PDS and FGMF Investment Approvals Spreadsheet that the FGMF, or its investments, were diversified.

As to (e) and (f), and generally, ASIC refers to paragraphs 13, **Error! Reference source not found.**(d), 31(i) and **Error! Reference source not found.** above, and SPS 530, SPS 220 and SPG 223 Prudential Practice Guide: Fraud Risk Management (June 2015) (SPG 223) at pg 13 and Attachment A.

41. The Prudent Superannuation Trustee, on or around 30 March 2023, would not have approved each of the Relevant Classes for selection as Investment Options and inclusion on the NQ Super Investment Menu, or then offered them or maintained an offer of them, to NQ Super members, or made investment in them at the direction of NQ Super members, without at least:
- (a) taking all (or alternatively, some or any) of the actions alleged in paragraph 34 above, or otherwise obtaining adequate information as to the matters alleged in paragraph 34 above as to the non-existence, mitigation or accurate identification to NQ Super members of risks identified in paragraph 40 individually and cumulatively; and
 - (b) adequately considering or assessing for itself the nature and characteristics of the FGMF and the FGMF Underlying Funds and the competence and capability of Falcon and First Guardian to invest and/or manage moneys invested by the trustee in the FGMF.

Particulars

As to (b), such consideration or assessment would involve:

- (i) reviewing and considering the information received upon taking the actions identified in paragraph 34 above (individually or cumulatively);
- (ii) assessing the risks identified in paragraph 40 above generally and in light of the further information obtained;

- (iii) assessing whether, given that further information, approval of the Relevant Classes as Investment Options complied with the IGF as applied to NQ Super and whether investment in each Relevant Class was appropriate.

42. ETSL as trustee of AMG Super failed to take the steps alleged in paragraph 41 above before 30 March 2023 or otherwise in the Relevant Period, and by its approval of each of the Relevant Classes for inclusion on the NQ Super Investment Menu referred to in paragraph 35 above, and by each of its acts or omissions in paragraphs 37 and 38:

- (a) failed to exercise in relation to all matters affecting AMG Super the same degree of care, skill and diligence as a prudent superannuation trustee would exercise in relation to an entity of which it is trustee and on behalf of the beneficiaries of which it makes investments;
- (b) so breached the covenant alleged in paragraph 12(a) above including on each such occasion it acted on the direction of members (or their advisors) to make investments in the Relevant Classes; and
- (c) thereby contravened s 54B(1) of the SIS Act on each such occasion the covenant was breached.

E2. Best financial interests of members – sections 52(2)(c) and 52(12) of the SIS Act

43. Further or alternatively, ETSL as trustee of AMG Super failed to take the steps alleged in paragraphs 41 above before 30 March 2023 or otherwise in the Relevant Period and by its approval of each of the Relevant Classes for inclusion on the NQ Super Investment Menu as alleged in paragraph 35 above, and by each of its acts or omissions in paragraphs 37 and 38, in those circumstances:

- (a) performed its duties and exercised its powers other than in the best interests of the NQ Super members; and
- (b) failed to promote the financial interests of NQ Super members;

Particulars

The financial interests of members of NQ Super included Investment Options being offered to members after proper

consideration by ETSL of all relevant information, and addressing risks of the investment option, with the provision of information by ETSL to NQ Super members as to the potential illiquidity of the Relevant Classes.

- (c) so breached the covenants alleged in:
 - (i) paragraph 12(b); and
 - (ii) paragraph 12(e) above,including on each such occasion it acted on the direction of members (or their advisors) to make further investments in the Relevant Classes; and
- (d) thereby contravened s 54B(1) of the SIS Act on each such occasion the covenant was breached.

E3. Due diligence in developing and offering Investment Options – section 52(6)(b) of the SIS Act

- 44. Further or alternatively, ETSL as trustee of AMG Super failed to take the steps alleged in paragraph 41 above before approving or while offering the Relevant Classes to NQ Super members, and by each of its acts or omissions in paragraphs 37 and 38, in those circumstances:
 - (a) did not exercise due diligence in developing and offering each of the Relevant Classes as an investment option to NQ Super members;
 - (b) thereby breached the covenant alleged in paragraph 12(d) above; and
 - (c) thereby contravened s 54B(1) of the SIS Act.

E4. Do all things necessary to ensure financial services provided efficiently, honestly and fairly – section 912A(1)(a) Corporations Act

- 45. Further or alternatively, at all material times, by its approval and offering of each of the Relevant Classes on the NQ Super Investment Menu in the circumstances as alleged, including as to non-compliance with or non-fulfilment of the provisions of the NQ Super PDS or ETSL policies, in paragraphs 29 to 39 above, ETSL:
 - (a) did not do all things necessary to ensure that the financial services covered by its AFSL (alleged in paragraph 2(c)) were provided efficiently, honestly and fairly;

- (b) thereby contravened s 912A(1)(a) of the Corporations Act; and
- (c) thereby contravened s 912A(5A) of the Corporations Act.

F. LOSS SUFFERED AS A RESULT OF CONTRAVENING ACTS OR OMISSIONS

F1. Liquidation of FGMF

- 46. On and from about 14 March 2024, ETSL removed each Relevant Class, or caused each Relevant Class to be removed, from the NQ Super Investment Menu and did not accept directions for investment in the Relevant Classes.
- 47. From around 27 May 2024, Falcon suspended acceptance of new applications to, and redemptions from, the FGMF.
- 48. On 9 April 2025, by order of the Federal Court of Australia:
 - (a) Falcon was placed into liquidation; and
 - (b) the liquidators of Falcon were directed to wind up the FGMF and its underlying sub-funds.
- 49. At that date, approximately \$60,100,775.20 of superannuation funds remained invested by or for members of NQ Super into one or more of the Relevant Classes.
- 50. As at the date of this Statement of Claim, by reason of the matters alleged in paragraph 48 above, ETSL as trustee of AMG Super:
 - (a) has not redeemed any units in the FGMF since at least May 2024; and
 - (b) cannot redeem any units in the FGMF.

F2. Causation of loss

- 51. If ETSL as trustee of AMG Super had not approved and offered, and maintained and continued to offer throughout the Relevant Period, each of the Relevant Classes to members as Investment Options on the NQ Super Investment Menu as alleged in paragraphs 35, 37, 38 and 39 above:
 - (a) members of NQ Super would not have been able to direct ETSL as trustee of AMG Super to invest assets of AMG Super credited to or recorded in their member accounts in the Relevant Classes; and

- (b) ETSL would not have invested AMG Super assets in the Relevant Classes.
52. By reason of the matters alleged in paragraphs 39, 47-50 and 51, as a result of ETSL's acts and omissions as alleged in paragraphs 42 to 44 above, in each case constituting contraventions of s 54B(1) of the SIS Act, AMG Super suffered loss or damage.

Particulars

The loss or damage suffered by AMG Super is the difference between:

(i) the value as recorded by ETSL of the units held in each Relevant Class on 27 May 2024, alternatively the net amount of funds invested in each of the Relevant Classes by ETSL as trustee of AMG Super at the direction of NQ Super members and not redeemed; and

(ii) the amount which is returned to NQ Super members following any distribution to unitholders of the FGMF referable to the units acquired by ETSL as AMG Super trustee.

In addition, value of any return on investments not achieved by reason of funds not being invested in alternatives to FGMF.

Further particulars may be provided after the service of expert evidence.

53. Further or alternatively, by reason of the matters alleged in paragraphs 39, 47-50 and 51 above, as a result of ETSL's contraventions of s 912A(5A) of the Corporations Act alleged in paragraph 45 above, AMG Super suffered loss or damage and/or NQ Super members suffered loss or damage.

Particulars

As to loss and damage to AMG Super, ASIC repeats the particulars to paragraph 52 above.

As to the loss or damage suffered by NQ Super members, the loss or damage is the difference between:

(A) the net amount of funds invested in each of the Relevant Classes at their direction; and

(B) the amount which is returned to AMG Super, and then to NQ Super members, following any distribution to unitholders of the FGMF referable to the units acquired upon those directions being completed.

In the alternative, the loss or damage suffered by NQ Super members is:

- (A) the difference between:
- (1) the value as recorded by ETSL of the units held in each Relevant Class on 27 May 2024, alternatively the net amount of funds invested in each of the Relevant Classes by ETSL as trustee of AMG Super at the direction of NQ Super members and not redeemed; and
 - (2) the net amount of funds that would have been invested in each Relevant Class by ETSL as trustee of AMG Super at the direction of the applicable NQ Super members, had ETSL applied a holding limit of not more than 50% to investment in each Relevant Class; and
- (B) less the amounts which may be returned to AMG Super, and then to NQ Super members, following any distribution to unitholders of the FGMF referable to the units acquired by ETSL as trustee.

In addition, value of any return on investments not achieved by reason of funds not being invested in alternatives to FGMF.

Further particulars may be provided after the service of expert evidence.

DATED 21 May 2026

This pleading was prepared by CM Archibald, L Hogan, LE Hulmes and A Lee of counsel.



Signed by Tom Jarvis
Lawyer for the Plaintiff

CERTIFICATE OF LAWYER

I Thomas Litchfield Jarvis certify to the Court that, in relation to the statement of claim filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 21 May 2026



Signed by Tom Jarvis

Lawyer for the Plaintiff